

NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged: Originating Application Starting a Representative Proceeding under Part IVA
Federal Court of Australia Act 1976 - Form 19 - Rule 9.32

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File Number: NSD1109/2024

File Title: GEOFFREY FISHER & ANOR v ISUZU MOTORS LIMITED (JAPANESE
PUBLIC COMPANY LIMITED BY SHARES)

Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Reason for Listing: To Be Advised

Time and date for hearing: To Be Advised

Place: To Be Advised



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



**Originating application starting a representative proceeding under
Part IVA of the Federal Court of Australia Act 1976**

No. of 20

Federal Court of Australia
District Registry: New South Wales
Division: General

Geoffrey Fisher and another
Applicants

Isuzu Motors Ltd (Japanese Public Company Limited by Shares)
Respondent

To the Respondent

The Applicants apply for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing: [Registry will insert time and date]

Place: Level 17, Law Court Building, 184 Phillip Street, Queens Square, Sydney NSW 2000

The Court ordered that the time for serving this application be abridged to [Registry will insert date, if applicable]

Filed on behalf of	Applicants
Prepared by	Martin del Gallego
Law firm	Piper Alderman
Tel	+61 2 9253 9999
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Email	MdelGallego@piperalderman.com.au
Address for service (include state and postcode)	Level 23, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000 AUSTRALIA DX 10216 Sydney Stock Exchange



Date:

Signed by an officer acting with the authority
of the District Registrar

Details of claim

On the grounds stated in the accompanying Statement of Claim, the Applicants claim:

1. Compensation pursuant to s 237 of the ACL (as defined in the Statement of Claim).
2. Damages.

Particulars

- (1) Pursuant to s 236 of the ACL.
- (2) Pursuant to ss 271 and 272 of the ACL.

3. Aggravated damages.

Particulars

- (1) Pursuant to s 236 of the ACL, a remedy of this nature not being excluded by s 87ZB of the *Competition and Consumer Act 2010* (Cth).
- (2) Pursuant to s 237 of the ACL, a remedy of this nature not being excluded by s 87ZB of the *Competition and Consumer Act 2010* (Cth).
- (3) Pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**).

4. Exemplary damages.

Particulars

- (1) Pursuant to s 236 of the ACL, damages of this nature not being excluded by s 87ZB of the *Competition and Consumer Act 2010* (Cth).
- (2) Pursuant to s 237 of the ACL, damages of this nature not being excluded by s 87ZB of the *Competition and Consumer Act 2010* (Cth).
- (3) Pursuant to s 23 of the Federal Court Act.

5. An award of damages pursuant to s 33Z(1)(e) of the Federal Court Act.
6. An award of damages pursuant to s 33Z(1)(f) of the Federal Court Act.
7. Interest.



Particulars

Pursuant to ss 51A and 52 of the Federal Court Act.

8. Costs.
9. Any further or other order that the Court deems fit.

Questions common to claims of group members

Capitalised terms are defined in the Statement of Claim.

The questions of law or fact common to the claims of the group members are:

Whether the Applicants have proven on their own behalf and on behalf of the group members the allegations in paragraphs 5 to 112 (inclusive) and 131 to 141 (inclusive) of the Statement of Claim, including as to:

Respondent

1. Whether the respondent is and was at all material times a 'manufacturer' within the meaning of the ACL or the TPA.
2. Whether the respondent:
 - a. was carrying on business in Australia; or
 - b. was otherwise connected to the relevant jurisdiction.

Defeat Devices

3. Whether the Affected Vehicles contained one or more pleaded unlawful "Defeat Devices", which impermissibly reduced the effectiveness of each vehicle's emission control system during normal vehicle operation.
4. Whether, by reason of the preceding fact pursuant to relevant Commonwealth, State and Territory motor vehicle legislation and regulation:
 - a. it was unlawful for the Affected Vehicles to be imported to, or supplied to the market in, Australia;
 - b. it was unlawful for the Affected Vehicles to be used on the road in Australia;
 - c. the Affected Vehicles could not be registered in the States and Territories of Australia;
 - d. the Affected Vehicles could be recalled;



- e. the use of the Affected Vehicles could be prohibited if such vehicle is inspected and found to be non-compliant; and
 - f. the registration of Affected Vehicles could be suspended or cancelled.
5. Whether the respondent programmed (or caused or permitted to be programmed) unlawful Defeat Devices in the Affected Vehicles.

General Representation

6. Whether the respondent made the “General Representation” that the Affected Vehicles complied with applicable national standards.
7. Whether the General Representation is or was:
 - a. made in trade or commerce;
 - b. false;
 - c. misleading or deceptive or was likely to mislead or deceive, in contravention of s 18 of the ACL;
 - d. liable to mislead the public as to the nature, the manufacturing process, the characteristics and/or the suitability for purpose of each of the Affected Vehicles, in contravention of s 33 of the ACL;
 - e. a false or misleading representation that each of the Affected Vehicles was of a particular standard or quality, and/or had particular performance characteristics, uses or benefits, in contravention of s 29 of the ACL; and
 - f. made in connection with the supply or possible supply of goods or in connection with the promotion of the supply of goods.
8. Whether the General Representation caused:
 - a. the Group Members to acquire their interests in the Affected Vehicles, at the prices they paid for their interests; and
 - b. dealers to make the Affected Vehicles available for sale in Australia.
9. Whether the contraventions concerning the General Representation caused the Group Members to suffer loss or damage.
10. Whether the respondent is liable to compensate the Group Members for that loss or damage.



Federal Government Representation

11. Whether the respondent made the “Federal Government Representation” by submitting information to the Federal Government purporting to show that the Affected Vehicles complied with Australian Design Rule 79.
12. Whether the Federal Government Representation is or was:
 - a. made in trade or commerce;
 - b. false;
 - c. misleading or deceptive or was likely to mislead or deceive, in contravention of s 18 of the ACL;
 - d. liable to mislead the public as to the nature, the manufacturing process, the characteristics and/or the suitability for purpose of each of the Affected Vehicles, in contravention of s 33 of the ACL;
 - e. a false or misleading representation that each of the Affected Vehicles was of a particular standard or quality, and/or had particular performance characteristics, uses or benefits, in contravention of s 29 of the ACL; and
 - f. made in connection with the supply or possible supply of goods or in connection with the promotion of the supply of goods.
13. Whether the Federal Government Representation caused:
 - a. each of the Affected Vehicles to receive Federal Government approval;
 - b. each of the Affected Vehicles to be made available for sale in Australia; and
 - c. the Group Members to acquire their interests in the Affected Vehicles, at the prices they paid for their interests.
14. Whether the contraventions concerning the Federal Government Representation caused the Group Members to suffer loss or damage.
15. Whether the respondent is liable to compensate the Group Members for that loss or damage.

Federal Government Omission

16. Whether, in the context of the respondent’s submission regarding the Affected Vehicles to the Federal Government:



- a. the respondent made the “Federal Government Omission” by failing to inform the Federal Government of matters including that the Affected Vehicles had a Defeat Device;
 - b. the Federal Government had a reasonable expectation that the respondent would disclose such matters to it, if they were the case;
 - c. those matters would have been material to the Federal Government’s decision to grant an approval with respect to the Affected Vehicles; and
 - d. the respondent was under an obligation to make submissions to the Federal Government that were true, correct, not misleading and did not omit any matter or thing.
17. Whether the respondent knew or ought to have known that the Affected Vehicles contained one or more of the Defeat Devices and therefore did not comply with Australian Design Rule 79.
18. Whether the Federal Government Omission:
- a. was made in trade or commerce;
 - b. was conduct that was misleading or deceptive or was likely to mislead or deceive the Federal Government, in contravention of s 18 of the ACL;
 - c. was in connection with the supply or possible supply of goods or in connection with the promotion of the supply or use of goods;
 - d. was liable to mislead the public as to the nature, the manufacturing process, the characteristics and/or the suitability for purpose of each of the Affected Vehicles, in contravention of s 33 of the ACL;
 - e. caused the Affected Vehicles to receive Federal Government Approval; and
 - f. caused Group Members to acquire their interests in the Affected Vehicles.
19. Whether the contraventions concerning the Federal Government Omission caused the Group Members to suffer loss or damage.
20. Whether the respondent is liable to compensate the Group Members for that loss or damage.

Federal Government Representation – Failure to Correct or Qualify

21. Whether, in the context of the respondent’s submission regarding the Affected Vehicles to the Federal Government:



- a. the Federal Government had a reasonable expectation that the respondent would correct or qualify the Federal Government Representation if the Affected Vehicles had one or more qualities, including having a Defeat Device; and
 - b. the respondent failed to correct the Federal Government Representation as to those matters.
22. Whether, in the context of the respondent's submission regarding the Affected Vehicles to the Federal Government:
- a. the respondent was under an obligation to make submissions to the Federal Government that were not misleading in any material particular; and
 - b. the fact that the Affected Vehicles had a Defeat Device would be a material particular to the Federal Government's decision to grant an approval.
23. Whether the failure to correct or qualify the Federal Government Representation:
- a. was made in trade or commerce;
 - b. was conduct that was misleading or deceptive or was likely to mislead or deceive the Federal Government, in contravention of s 18 of the ACL;
 - c. caused the Affected Vehicles to receive Federal Government approval; and
 - d. caused the Group Members to acquire their interests in the Affected Vehicles.
24. Whether the failure to correct or qualify the Federal Government Representation caused the Group Members to suffer loss or damage.
25. Whether the respondent is liable to compensate the Group Members for that loss or damage.

Australian Distributor Representation

26. Whether the respondent made the "Australian Distributor Representation" by providing materials and specifications to the Australian Distributor.
27. Whether the Australian Distributor Representation is or was:
- a. made in trade or commerce;
 - b. false;
 - c. misleading or deceptive or was likely to mislead or deceive, in contravention of s 18 of the ACL; and



- d. a false or misleading representation that each of the Affected Vehicles was of a particular standard or quality, and/or had particular performance characteristics, uses or benefits, in contravention of s 29 of the ACL.
28. Whether the Australian Distributor Representation caused:
- each of the Affected Vehicles to be made available for sale in Australia; and
 - the Group Members to acquire their interests in the Affected Vehicles, at the prices they paid for their interests.
29. Whether the contraventions concerning the Australian Distributor Representation caused the Group Members to suffer loss or damage.
30. Whether the respondent is liable to compensate the Group Members for that loss or damage.

Australian Distributor Omission

31. Whether, during the Relevant Period, the respondent made the "Australian Distributor Omission", by not informing the Australian Distributor that the Affected Vehicles were not entitled to Federal Government approval.
32. Whether the Australian Distributor had a reasonable expectation that the respondent would disclose such a matter to it, if it was the case.
33. Whether the Australian Distributor Omission:
- was made in trade or commerce;
 - was conduct that was misleading or deceptive or was likely to mislead or deceive the Australian Distributor, in contravention of s 18 of the ACL;
 - caused the Australian Distributor to accept each Affected Vehicle for its stock and/or sell (or otherwise dispose of any interest in) the Affected Vehicle to Group Members; and
 - caused Group Members to acquire their interests in the Affected Vehicles.
34. Whether the contravention concerning the Australian Distributor Omission caused the Group Members to suffer loss or damage.
35. Whether the respondent is liable to compensate the Group Members for that loss or damage.



Australian Distributor Representation – Failure to Correct or Qualify

36. Whether, in the context of the respondent's Australian Distributor Representation:
- a. the Australian Distributor had a reasonable expectation that the respondent would correct or qualify the Australian Distributor Representation if the Affected Vehicles had one or more qualities, including if they were not entitled to Federal Government approval; and
 - b. the respondent failed to correct the Australian Distributor Representation as to those matters.
37. Whether the failure to correct or qualify the Australian Distributor Representation:
- a. was made in trade or commerce;
 - b. was conduct that was misleading or deceptive or was likely to mislead or deceive the Australian Distributor, in contravention of s 18 of the ACL;
 - c. caused the Australian Distributor to accept each Affected Vehicle for its stock and/or sell (or otherwise dispose of any interest in) the Affected Vehicle to Group Members; and
 - d. caused Group Members to acquire their interests in the Affected Vehicles.
38. Whether the failure to correct or qualify the Australian Distributor Representation caused the Group Members to suffer loss or damage.
39. Whether the respondent is liable to compensate the Group Members for that loss or damage.

Contravention of a safety standard

40. Whether Australian Design Rule 79 was a "safety standard" for the purposes of s 106 of the ACL.
41. Whether the fact that the Affected Vehicles contained Defeat Devices meant that they did not comply with the above safety standards.
42. Whether the Affected Vehicles were (or included) "Consumer Vehicles", being "consumer goods", within the meaning of s 2 of the ACL.
43. Whether the respondent:
- a. in supplying the Consumer Vehicles to Group Members in trade or commerce, contravened s 106(1) of the ACL; or
 - b. in manufacturing the Consumer Vehicles, contravened s 106(3) of the ACL.



44. Whether the respondent's manufacture and/or supply of Consumer Vehicles that did not comply with the relevant safety standard caused the Group Members who acquired an interest in Consumer Vehicles to suffer loss or damage.
45. Whether the respondent is liable to compensate the Group Members who acquired an interest in Consumer Vehicles for that loss or damage.

Unconscionable Conduct

46. Whether the respondent engaged in conduct which was, in all the circumstances, unconscionable.
47. Whether the respondent's above unconscionable conduct:
 - a. was in trade or commerce and in connection with the supply or possible supply of the Affected Vehicles to Group Members, in contravention of s 21 of the ACL;
 - b. caused the Group Members to suffer loss or damage; and
 - c. means that the respondent is liable to compensate the Group Members for that loss or damage.

Whether the Applicants have proven on their own behalf and on behalf of the Group Members who are Affected Persons, the allegations in paragraphs 113 to 130 (inclusive) of the Statement of Claim, including as to:

Guarantee of Acceptable Quality

48. Whether the Affected Vehicles were goods of a kind ordinarily acquired for personal, domestic or household use, and so whether the Affected Vehicles were, for that reason, supplied to 'Consumers' as defined in s 3(1) of the ACL.
49. Whether the first supply of Affected Vehicles to Consumers was the subject of the Guarantee of Acceptable Quality.
50. Whether the fact that the Affected Vehicles contained Defeat Devices meant that they were not of acceptable quality within the meaning of s 54 of the ACL.
51. Whether that failure to comply with the Guarantee of Acceptable Quality:
 - a. caused a reduction in value of the Affected Vehicles;
 - b. caused the Group Members who Affected Persons to suffer loss or damage; and



- c. means that the respondent as manufacturer under s 272 of the ACL is liable to compensate Group Members who are Affected Persons for the relevant loss or damage.

Express Warranty

52. Whether the respondent gave the “Express Warranty” that the Affected Vehicles complied with relevant national vehicle standards, under s 2 of the ACL.
53. Whether the Express Warranty:
 - a. was a representation, assertion or undertaking that related to the “quality, state, condition, performance or characteristics” of the Affected Vehicles;
 - b. was made or given in connection with the supply or promotion of the Affected Vehicles;
 - c. had the natural tendency of inducing persons to acquire the Affected Vehicles; and
 - d. was given or made in relation to goods within the meaning of s 2 of the ACL.
54. Whether the respondent guaranteed as manufacturer that it would comply with the Express Warranty.
55. Whether the fact that the Affected Vehicles contained Defeat Devices meant that the respondent failed to comply with:
 - a. the Express Warranty; or
 - b. the guarantee that it would comply with the Express Warranty.
56. Whether that failure to comply with the Express Warranty:
 - a. caused a reduction in value of the Affected Vehicles;
 - b. caused the Group Members who are Affected Persons to suffer loss or damage; and
 - c. means that the respondent as manufacturer under s 272 of the ACL is liable to compensate Group Members who are Affected Persons for the relevant loss or damage.
57. Whether damages can and ought to be awarded on a no transaction basis.
58. Whether exemplary damages can and ought to be awarded and, if so, the quantum of those damages.
59. Whether aggravated damages can be awarded.



60. Whether damages can be awarded on an aggregate basis and, if so, the quantum of those damages.

Representative action

The Applicants bring this application as representative parties under Part IVA of the Federal Court Act.

The group members to whom this proceeding relates are set out in paragraph 1 of the Statement of Claim.

Applicants' address

The Applicants' address for service is:

Place: Piper Alderman

Level 23, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000

AUSTRALIA

Email: MdelGallego@piperalderman.com.au

The First Applicant's address is 285 Pranjip Road, Euroa 3666.

The Second Applicant's address is 21-23 Webb Road, Airport West, Victoria 3042.

Service on the Respondent

It is intended to serve this application on the Respondent.

Date: 13 August 2024

A handwritten signature in blue ink, appearing to read "Martin del Gallego", written over a horizontal dotted line.

Signed by Martin del Gallego, Lawyer for the Applicants



Schedule

No. of 20

Federal Court of Australia
District Registry: New South Wales
Division: General

Applicants

First Applicant: Geoffrey Fisher
Second Applicant: CDR Geotechnical & Environmental Services Pty Ltd
(ACN 168 381 584)

Date: 13 August 2024